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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ANGEL ARIAS,** **Defendant and Appellant.**	**A095953** **(Solano County Super. Ct. No. FCR181871)**

Defendant appeals from a judgment following a jury trial in which he was found guilty of forcible rape (Pen. Code,[1] § 261, subd. (a)(2)) (count 2); simple kidnapping (§ 207, subd. (a)) (count 4); forcible oral copulation (§ 288a, subd. (c)(2)) (count 5); and corporal injury to a former cohabitant (§ 273.5, subd. (a)) (count 6). The jury acquitted defendant of aggravated kidnapping to commit forcible rape (§ 209, subd. (b)(1)), but convicted him of the lesser included offenses of misdemeanor assault and battery (§§ 240, 242) (count 1). The jury also acquitted defendant of first degree residential burglary (§ 459) (count 3) and of making terrorist threats (§ 422) (count 7). The jury found not true allegations that the victim was kidnapped for the purpose of committing forcible rape and forcible oral copulation (§ 667.8, subd. (a)) (counts 2 & 5). The trial court sentenced defendant to prison for a total term of ten years eight months.[2]

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1 All undesignated section references are to the Penal Code.

2 In the interests of justice, the trial court dismissed the lesser included offense convictions for misdemeanor assault and battery under count 1.

On appeal defendant asserts the trial court committed a variety of instructional errors. We agree with two of these contentions, but find each of these errors harmless and affirm.

STATEMENT OF FACTS

The victim, Mary E., was involved in a romantic relationship with defendant from June 1994 until September or October 1996, when she informed him that she wanted to end their relationship. After 1996, the victim continued to see defendant off and on, although she did not consider herself romantically involved with him after 1996. In October 1996, she moved from Contra Costa County to Solano County. Thereafter, she continued to see defendant occasionally. Sometimes he would show up unexpectedly at her work. There also were instances when he would come to her residence without warning, at times late at night. Defendant had a key to the victim's garage door and would enter the house in that manner.

In July 1998, the victim asked defendant to return her garage key, which he did. After that, he did not show up at her house for approximately three months. From July 1998 to March 2000, he never came to her residence in the middle of the night, although on several occasions he had asked her to get back together with him, and on at least one occasion she engaged in sex with him. Prior to March 12, 2000, the day of the incident, the victim had not seen defendant for two or three weeks.

On the evening of March 11, 2000, the victim had about three or four beers before she went to bed. She was living alone at the time. She believed she secured the entries to her residence before going to sleep that night. At about 1:00 a.m. (March 12), the victim woke up, turned over, and saw defendant standing next to her bed. She asked him how he had entered the house and what he was doing there. He replied, "I'm an Angel, I can get in anywhere." Defendant climbed on top of the victim, and said, "Tonight you're going to die." He then started choking her. He also told the victim that he could leave her body someplace and there would be no links to who had done so. The victim struggled and eventually got away. Once the victim stood up, defendant grabbed her and

started punching her in the ribs. The victim punched defendant back a few times. He eventually stopped hitting her.

Hoping to calm him down, the victim suggested they go downstairs so that she could have a cigarette. He agreed. While smoking a cigarette outside the house, she did not attempt to run for help. While downstairs, defendant asked the victim if she wanted to go for a ride with him. The victim tried to decline, saying it was cold outside, but defendant told her that "if you don't come with me willingly, I'll take you forcibly." He also told her, "You're coming with me, let's just go take a little ride." The victim felt that she had no choice but to go with defendant.

As defendant led the victim around the side of the house, she picked up a piece of wood and tried to hit him with it. He grabbed the wood and tossed it away. Just before entering his truck, the victim started screaming. Defendant put a hand over her mouth and an arm around her neck. He then placed her in the truck, got in himself, and drove away. The victim suggested that they go to Denny's restaurant because she was thirsty and her neck hurt. Instead, defendant drove toward the Air Force base and eventually parked on a dirt road in the countryside.

They got out of the truck and the victim told defendant she was cold. He gave her his jacket and suggested that they get into the covered truck bed and talk, which they did. Defendant told the victim that she had "driven him to this" by not returning his calls and not wanting to see him. He then asked if he could lick her genitals. Fearing that he might start hitting her again, the victim replied, "Sure." Defendant removed the victim's sweat pants and underwear and orally copulated her. He then said, "You want to have sex?," to which she again told him, "Sure." The victim remained terrified at the time and thought that, if she did what he wanted, he would let her go. They had vaginal intercourse and afterwards he asked why things could not return to the way they had been before. The victim responded, "How can you have a relationship with somebody that you are terrorized of." They remained parked for about 45 minutes and returned to the victim's house at about 3:00 a.m.. During the return trip, defendant asked if she was going to call the police and have him arrested. The victim said "No," and defendant told

her that if she did he would eventually "come back and finish the job," which the victim interpreted to mean that he would kill her.

At the residence, defendant asked if he could stay the night and the victim did not say no, although she remained afraid of him. They went upstairs and into bed together and he asked if they "could make love." The victim responded, "You already did. Good night." Defendant fell asleep, but the victim laid in bed shivering all night. She got up at about 7:30 a.m. while he was still sleeping. The victim called her daughter Michelle and left a voice mail message saying that defendant was there and that he had threatened her. She also asked Michelle to drive by the house and copy down defendant's license plate number "in case anything happened to me." The victim did not call the police because she was convinced defendant would carry out his threat to return and kill her.

Michelle returned her mother's call and had a very brief conversation with her. She then listened to her mother's message and called "911." The police, in turn, called the victim. Shortly thereafter, the police arrived and found defendant asleep in bed. He was arrested.

Defendant was transported to the police department and advised of his *Miranda*[3] rights, which he waived. He made a taped statement to the police that was later played to the jury.

The victim was examined on the day of the incident by Elizabeth Cassinos, a registered nurse and the program coordinator of the Napa/Solano Sexual Assault Response Team. Cassinos observed multiple contusions on the victim's arms, legs, hands, neck, back and chest. The victim also had two areas of trauma on her genitals, which were consistent with nonconsensual intercourse and with the history she provided to Cassinos. The jury was shown slides of her injuries. Cassinos examined defendant that day and noticed fresh bruises and scratches on his arm, hand, and neck.

When the victim returned home from the hospital, she noticed that a window screen had been removed and placed nearby on the ground and that the screen door

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3 *Miranda v. Arizona* (1966) 384 U.S. 436.

handle had been broken. Neither of them had been damaged the previous day. Her daughter testified that she also saw the damaged screens. The victim called the arresting officer, who returned to the house and observed the window screen had been removed and also observed the broken screen door handle.

The theory of the defense was that the victim lied about what had taken place and had consented to his sexual advances. The defense also argued that defendant was too intoxicated to have formed the criminal intent to commit the crimes. Defendant told the police that he had consumed five beers that night.

DISCUSSION

I. *Claims of Instructional Error*

A. *CALJIC No. 1.23.1*

Without objection, the trial court instructed the jury in accordance with CALJIC No. 1.23.1 as follows: "In prosecutions under [section 261, subdivision (a)(2)], that's the forcible rape count, or [section 288a, subdivision (c)(2)], which is forcible oral copulation count, the word 'consent' means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. [¶] The fact, if established, that defendant and [the victim] engaged in a current or previous relationship does not by itself constitute consent."

The second paragraph of the instruction is based on section 261.6, which states in part: "A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289. [¶] Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent." Defendant contends that because lack of consent is an element of the rape and forcible oral copulation offenses, this instruction impermissibly shifted the prosecution's burden of proof on the issue of consent to the defense; he claims this violated his constitutional rights to due process and a fair trial by interfering with the jury's power and duty to decide for itself what evidence might create a reasonable doubt as to guilt. The contention lacks merit.

A similar claim was made and rejected in *People v. Gonzalez* (1995) 33 Cal.App.4th 1440. There, the court reasoned: "CALJIC No. 1.23.1 did not shift the burden of proof on consent to the defense or create a presumption of lack of consent. The instruction merely defined consent." (*Gonzalez*, at p. 1443.) We agree. In this case, the instruction correctly informed the jury that the fact defendant and the victim may presently have or previously have had a dating relationship does not "by itself" constitute consent. CALJIC No. 1.23.1 reiterates the provision of section 261.6 that a dating or marital relationship "shall not be sufficient to constitute consent." Instead, a dating relationship is just one piece of evidence for the jury to consider, along with all the other evidence adduced at the trial, to determine if the sexual acts at issue were consensual. Nothing in the instruction suggests that the jury could not consider defendant's dating relationship with the victim as one piece of evidence in support of a consent defense. In other words, the jury was not precluded from considering the existence of a dating relationship in resolving the issue of consent; instead, it was correctly told that the fact of a dating relationship, without more, would be insufficient to establish consent.

In addition, the *Gonzalez* court considered CALJIC No. 1.23.1 in the context of other instructions given to the jury that defined the elements of the sexual assaults at issue in the case. The court concluded that the instructions, taken as a whole, had informed the jury the prosecution bore the burden of proving lack of consent. (*People v. Gonzalez, supra,* 33 Cal.App.4th at p. 1443.) Likewise, in the instant case, the trial court gave the jury other instructions which made it clear that the prosecution had to establish lack of consent on the victim's part as a prerequisite to finding defendant guilty of rape and forcible oral copulation. The trial court instructed the jury with CALJIC Nos. 10.00 (rape) and 10.10 (forcible oral copulation), each of which requires that the acts constituting these offenses be accomplished "against [a person's] will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." Each instruction further defines "against [a person's] will" as meaning "without the consent of the alleged victim." The court also instructed the jury with CALJIC No. 10.61.1, which stated that evidence had been introduced for the purpose of showing that defendant and

the victim had engaged in consensual sexual intercourse on one or more occasions in the past, and that if the jury believed this evidence, the jury should consider it "for the limited purpose of tending to show that [the victim] consented to the acts of intercourse charged in this case, or the defendant had a good faith reasonable belief that [the victim] consented to the act of sexual intercourse. [¶] And ladies and gentlemen, this includes both the act of sexual intercourse and then the oral copulation count." Considered together, CALJIC Nos. 1.23.1, 10.00, 10.10, and 10.61.1 were clear in indicating that the prosecution had the burden of proving lack of consent and that the jury could consider defendant's relationship with the victim as evidence of her consent. Thus, no error occurred.

B. *CALJIC No. 10.65*

Defendant contends that, as to the rape and forcible oral copulation charges, the trial court erred by failing to give the jury, sua sponte, the instruction set out in CALJIC No. 10.65,[4] the *Mayberry*[5] instruction. Under *Mayberry*, a defendant's reasonable and good faith mistake of fact about consent is a defense to a sexual offense. (*People v. Williams* (1992) 4 Cal.4th 354, 360.) A trial court need only give a *Mayberry* instruction on its own motion when it appears that the defendant is relying on a defense of reasonable belief in consent, or if there is substantial evidence supporting such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v.*

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4 CALJIC No. 10.65 (6th ed. 1996) provides: "In the crime of [unlawful] [forcible rape] [oral copulation by force and threats] . . . , criminal intent must exist at the time of the commission of the [crime charged]. There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse] [oral copulation]. . . . Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge. [¶] [However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief.]" [¶] If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the [sexual intercourse] [oral copulation] . . . , you must find [him] [her] not guilty of the crime.

5 *People v. Mayberry* (1975) 15 Cal.3d 143.

Rhoades (1987) 193 Cal.App.3d 1362, 1369.) The record reveals that the trial court informed counsel of its intention to give the instruction, which had been requested by the prosecution, but then failed to do so. It appears that neither defense counsel nor the prosecution noticed the omission.

"The *Mayberry* defense . . . permits the jury to conclude that both the victim and the accused are telling the truth. The jury will first consider the victim's state of mind and decide whether she consented to the alleged acts. If she did not consent, the jury will view the events from the defendant's perspective to determine whether the manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not. [Citation.]" (*People v. Romero* (1985) 171 Cal.App.3d 1149, 1155-1156.)

In *Williams*, the Supreme Court defined the substantial evidence necessary to warrant a *Mayberry* instruction. The court noted that the *Mayberry* defense has subjective and objective components. "The subjective component asks whether the defendant honestly and in good faith, [but] mistakenly, believed that the victim consented to sexual intercourse." (*People v. Williams, supra,* 4 Cal.4th at pp. 360-361, fn. omitted.) To satisfy this component, there must be evidence of the victim's equivocal conduct on the basis of which the defendant erroneously believed there was consent. The objective component asks whether the defendant's mistaken belief that the victim consented was reasonable under the circumstances. (*Id*. at p. 361.) *Williams* held that "the instruction should not be given absent substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (*Id*. at p. 362.) Mere "divergent accounts [of what occurred] create no middle ground from which [the defendant can] argue he reasonably misinterpreted [the victim's] conduct." (*Ibid*.)

In *Williams*, both the victim and the defendant testified that they spent time together, and then the victim accompanied the defendant to a hotel, where the clerk handed them a bed sheet when they checked in. The defendant testified that the victim initiated the sexual contact, even fondling his genitals to overcome his impotence caused

by diabetes, and inserted his penis into her vagina. According to the victim, the defendant blocked her way when she tried to leave, and forcibly raped her. (*People v. Williams, supra,* 44 Cal.4th at pp. 357-359.)

The trial court refused a requested instruction on reasonable and good faith, but mistaken, belief as to consent, and the Supreme Court agreed, holding there was no substantial evidence to support a *Mayberry* instruction. "These wholly divergent accounts create no middle ground from which [the defendant] could argue he reasonably misinterpreted [the victim's] conduct. [Citations.] There was no substantial evidence of equivocal conduct warranting an instruction as to reasonable and good faith, but mistaken, belief of consent to intercourse." (*People v. Williams, supra,* 4 Cal.4th at p. 362.)

In this case, substantial evidence was presented to warrant a *Mayberry* instruction. The victim testified that defendant's conduct at her house when she awoke did not involve any sexual acts, sexual threats or mention of sex. However, after taking her by force to the remote location in the countryside, defendant asked her if he could lick her genitals. Out of fear that he might start hitting her again, she replied, "Sure." Once defendant had orally copulated her, defendant asked if she wanted to have sex, to which she again told him, "Sure." The victim thought that if she did what he wanted, he would let her go. They had vaginal intercourse and later the two of them returned to her residence. At the residence, defendant asked if he could stay the night and the victim did not disagree. Once they were in bed together, defendant asked if they could engage in sex, which she declined by responding, "You already did. Good night." Following her refusal, defendant had no further sexual contact with her and instead went to sleep. He was awakened by the police, who took him into custody.

Thus, the victim's own testimony shows that defendant asked for her permission before engaging in each of the acts underlying the sexual offenses charged against him, and refrained from sexual activity when she rebuffed his renewed request for sexual intercourse. This evidence is precisely the sort of equivocal conduct, referred to in *Williams*, that could reasonably and in good faith have been relied upon to form a

mistaken belief on his part of her consent to the acts of oral copulation and sexual intercourse. It is fully consistent with and supports the prosecutor's request that CALJIC No. 10.65 be given to the jury. It also explains the trial court's expressed intention to give the instruction. The record contains no hint that the court ever changed its mind in this regard. Instead, the failure to give the instruction appears to have been mere oversight that, unfortunately, was never noticed by either counsel or the court.

The victim's explanation that her assent to the sexual conduct was a product of defendant's threat of physical violence seems well-supported by the evidence. However, in *Williams* the Supreme Court clearly stated that such evidence does not preclude the *Mayberry* instruction. "No doubt it would offend modern sensibilities to allow a defendant to assert a claim of reasonable and good faith but mistaken belief in consent based on the victim's behavior *after* the defendant had exercised or threatened 'force [or] violence . . . .' [Citations.] However, a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others. Since a trial judge cannot predict which evidence the jury will find credible, he or she must give the *Mayberry* instruction whenever there is substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, despite the alleged temporal context in which that equivocal conduct occurred. The jury should, however, be further instructed, if appropriate, that a reasonable mistake of fact may not be found if the jury finds that such equivocal conduct on the part of the victim was the product of 'force [or] violence . . . .' " (*People v. Williams, supra,* 4 Cal.4th at p. 364.) CALJIC No. 10.65 has incorporated language consistent with the *Williams* directive.

We conclude the trial court erred in omitting the *Mayberry* instruction, but the error was harmless beyond a reasonable doubt.[6] In making this determination, we have the advantage of hindsight, not available to the trial court. Thus, in deciding if there is a

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[6] Because lack of consent is an element of the rape and forcible oral copulation offenses (see CALJIC Nos. 10.00, 10.10), the failure to give the instruction must be assessed under the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.)

reasonable possibility that the jury could have concluded that the victim's expressed assent to the sexual activity was not the result of the violence that preceded it, we may consider, for example, the verdicts reached by the jury. We decide, beyond a reasonable doubt, that the error complained of did not contribute to this jury's verdicts on counts 2 and 5. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Flood, supra,* 18 Cal.4th at p. 504.)

Under *Mayberry*, a mistake regarding consent must be reasonable as well as honestly held. An objective and a subjective test are applied. Consistent with this, the Supreme Court in *Williams* required that the jury be instructed that it may not acquit if it finds that the victim's equivocal conduct was coerced. In such a situation any mistake as to consent is not reasonable. (*People v. Williams*, *supra,* 4 Cal.4th at p. 364.) In this case the "equivocal" conduct that preceded the sexual assault was the victim's assent to defendant's request for sex. By its verdicts in counts 2 and 5, the jury implicitly found the victim credible and determined that her assent had been coerced. No other conclusion is possible from the decision to convict on the two charges. Thus these verdicts demonstrate that there is no reasonable possibility that a jury, properly instructed under *Mayberry* and *Williams* would have rendered a different verdict. (*People v. Avila* (1995) 35 Cal.App.4th 642, 665 [if the facts found by the jury are such that it is clear beyond a reasonable doubt that if the jury had been properly instructed its verdict would have been the same, an instructional error is harmless]; see *People v. Adcox* (1988) 47 Cal.3d 207, 243-244.)

The conclusion that the error is harmless is reinforced by the fact that defendant never sought a *Mayberry* instruction, and, after the court acceded to the prosecutor's request to give the instruction, never suggested to the jury in his closing argument that it applied to this case. We do not hold that this justifies the court's inadvertent failure to give the instruction. However, in assessing the prejudice resulting from this failure, we believe consideration of defendant's theory of his case may be taken into account. At the time of his closing argument, defendant was under the impression that the court was going to give the *Mayberry* instruction. Yet, his argument focused primarily on

discrediting the victim and never touched on the mistake of consent defense. Defendant's choice of argument may reflect his appreciation of the difficulty of succeeding on the *Mayberry* defense if the jury believed the victim's account of the violent conduct.

Because we find beyond a reasonable doubt that the jury would have reached the same result if it had been properly instructed with CALJIC No. 10.65, the error was harmless.

C. *CALJIC No. 2.71*

The victim testified that defendant made several statements during the course of his encounter with her that night. Among his statements, defendant purportedly told her "[t]onight you are going to die" and that he could leave her body someplace where there would be no links to who had done so. Later, defendant supposedly told her "if you don't come with me willingly, I'll take you forcibly." He also allegedly said the victim had "driven him to this" by not returning his calls and not wanting to see him. She claims he also threatened to "come back and finish the job" if she told the police about the things he had done. Defendant contends that these disputed statements constituted an "admission" or a "statement" as those terms are used in CALJIC Nos. 2.71 and 2.71.7,[7] and therefore the trial court was obligated to instruct the jury, sua sponte, with those instructions so that

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[7] CALJIC No. 2.71 (6th ed. 1996) states: "An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]"

CALJIC No. 2.71.7 (6th ed. 1996) states: "Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he] [she] is charged was committed. [¶] It is for you to decide whether the statement was made by [a] [the] defendant. [¶] Evidence of an oral statement ought to be viewed with caution."

the jury would know to view the statements with caution. We agree, but find the error harmless.[8]

The term "admission" as used in CALJIC No. 2.71 has been interpreted broadly to refer to any statement that "tends to establish [the defendant's] guilt when considered with the remaining evidence in the case. [Citation.]" (*People v. Brackett* (1991) 229 Cal.App.3d 13, 19; *People v. Mendoza* (1987) 192 Cal.App.3d 667, 675-676, cited with approval by *People v. Garceau* (1993) 6 Cal.4th 140, 179-180.) Despite the confusing use of the term "admission," which seems to suggest a particular type of hearsay statement, courts have consistently required this instruction even when the defendant's oral statements are not introduced for their truth. For example in *Mendoza*, the court ruled that the cautionary instructions were properly given, over the defendant's objection, when the prosecutor introduced exculpatory statements of the defendant that were impeached by contrary observations of two police officers. (*Mendoza*, at pp. 672, 675-676.) In *Brackett,* the victim testified to certain threats and demands the defendant allegedly made during a sexual assault. The court extended *Mendoza* and approved use of the cautionary instruction over the defendant's contention that his alleged statements were not admissions introduced for their truth. (*Brackett*, at pp. 18, 20.) Finally, *People v. Carpenter* (1997) 15 Cal.4th 312 considered a situation strikingly similar to our own. In *Carpenter*, the Supreme Court held that the trial court erred by failing to give the cautionary instruction, after admitting a statement allegedly made by the defendant during the commission of a rape-murder that "was part of the crime itself." (*Id.* at p. 392.) " 'The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made.' [Citation.] This purpose would apply to any oral statement of the defendant, whether made before, during, or after the crime." (*Id.* at p. 393.)

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[8] Because the defendant's statement to the police was recorded and this recording is a "writing" under Evidence Code section 250, it did not trigger the cautionary instruction contained in CALJIC No. 2.71.

When, as here, CALJIC No. 2.71 is appropriate, the trial court is required to provide it sua sponte. (*People v. Marks* (1988) 45 Cal.3d 1335, 1346; *People v. Beagle* (1972) 6 Cal.3d 441, 455-456; *People v. Lopez* (1975) 47 Cal.App.3d 8, 13-15; *People v. Henry* (1972) 22 Cal.App.3d 951, 956-960.) The court's failure to do so was error. We review this error under the familiar standard for state law error: "whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given. [Citations.]" (*People v. Carpenter, supra,* 15 Cal.4th at p. 393.) We conclude the error was harmless.

We consider the effect of this error on counts 2 and 5 (the sexual assaults), count 4 (simple kidnapping), and count 6 (corporal injury to cohabitant). As to count 6, none of the comments of defendant was material; the jury simply had to decide whether or not to credit the victim's testimony that he had inflicted bodily injury upon her by physical force causing a wound or external or internal injury. (CALJIC No. 9.35.) Given the substantial physical evidence corroborating this testimony, the failure to give the cautionary instruction was harmless as to count 6.

As to counts 2, 4 and 5, at first blush, defendant's statements appear significant. However, several factors lead us to conclude the instructional error was harmless. First, as noted in *Carpenter*, the trial court "fully instructed the jury on judging the credibility of a witness, thus providing guidance on how to determine whether to credit the testimony." (*People v. Carpenter, supra,* 15 Cal.4th at p. 393.) Further, "[a]s the cautionary instruction would have defined an 'admission' the defense may have preferred it not be given. This circumstance does not obviate the court's sua sponte duty, but may be considered in determining prejudice." (*Ibid.*)

Second, the jury's verdicts on the final two charges in the information are instructive. On count 7 (making terrorist threats), the jury acquitted. Thus it appears that even without the cautionary instruction, the jury discounted the victim's testimony regarding the threatening statements allegedly made by defendant. On the other hand, the jury convicted on count 6 (corporal injury to cohabitant), obviously believing the victim's testimony about the course of violent conduct engaged in by defendant on the night in

question. Much of that violence preceded the kidnapping and sexual assaults. Thus, we believe a fair reading of the verdicts on counts 6 and 7 suggests the jury gave far greater weight to the violence than to the threats as a basis for concluding that the victim involuntarily accompanied defendant and submitted to his sexual demands. For all of these reasons, we do not believe it is reasonably probable the jury would have reached a result more favorable to defendant had the cautionary instruction been given.

D. *CALJIC No. 17.41.1*

Defendant contends the trial court erred in instructing the jury with CALJIC No. 17.41.1 which provided: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation." He argues the instruction violated his right to jury trial under the federal and state Constitutions, because it improperly imposed a prior restraint on the jurors' free speech in the jury room and likely had a coercive and chilling effect on deliberations. He asserts the instruction was structural error, requiring reversal per se. Defense counsel objected in the trial court to the giving of this instruction.

Recently, in *People v. Engelman* (2002) 28 Cal.4th 436, the Supreme Court considered the propriety of CALJIC No. 17.41.1 and rejected challenges based on federal and state constitutional grounds. It reasoned, "although the secrecy of deliberations is an important element of our jury system," no authority suggests that the federal or state constitutional right to jury trial "requires absolute and impenetrable secrecy for jury deliberations in the face of an allegation of juror misconduct, or that the constitutional right constitutes an absolute bar to jury instructions that might induce jurors to reveal some element of their deliberations." (*Engelman*, at p. 443.) The court held that even though CALJIC No. 17.41.1 might induce a juror who believes there has been juror misconduct to reveal, or threaten to reveal, the content of deliberations unnecessarily, the instruction does not constitute a violation of the constitutional right to jury trial or

otherwise constitute error under state law. (*Engelman*, at p. 444.) *Engelman* also concluded that because the instructions as a whole fully informed the jury of its duty to reach a unanimous verdict based upon the independent and impartial decision of each juror, it rejected the state constitutional claim that CALJIC No. 17.41.1 violated the defendant's right to a unanimous jury verdict and to the independent and impartial decision of each jury. (*Engelman*, at p. 444.) Thus, the trial court did not err in giving this instruction.[9]

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

STEVENS, Acting P.J.

GEMELLO, J.

[9] In his opening brief, defendant challenged the court's refusal to permit him to discharge his retained counsel. However, in his reply brief, appellant asked that we take judicial notice of the record in his pending appeal, *People v. Arias* (A098766), which reflects that the trial court subsequently realized its error and granted the motion to relieve counsel. We grant the request for judicial notice (Evid. Code, §§ 452 subd. (d), 459 subd. (a)) and will not consider this ground of appeal.